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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Hai Van Le,

No. CV 11-0744-PHX-RCB (ECV)

10 Plaintiff,

11 vs.

ORDER

12 Arizona Department of Corrections, et
13 al.,

14 Defendants.
15

16 Plaintiff Hai Van Le brought this civil rights action pursuant to 42 U.S.C. § 1983
17 against several employees of the Arizona Department of Corrections (ADC). (Doc. 1.)
18 The remaining Defendants—ADC Director Charles Ryan, Deputy Warden Hugh Matson,
19 Protective Segregation Administrator Herb Haley, and Correctional Officer Michelet
20 Smith—file a second motion for summary judgment.¹ (Doc. 72.) In addition, Plaintiff
21 files a response and cross-motion for summary judgment (Doc. 76) and a motion for
22 Extension of Time to Respond to the Court’s *Rand* notice (Doc. 80). Defendants file a
23 Motion to Strike Plaintiff’s Motion for Summary Judgment (Doc. 84) and Plaintiff moves
24 for Leave to File his Cross-motion (Doc. 85).

25 The Court will grant Defendants’ Motion for Summary Judgment, grant Plaintiff’s
26 Motion for Extension of Time to Respond to the Court’s *Rand* notice, and deny

27
28 ¹The Court provided Plaintiff a second Notice required by *Rand v. Rowland*, 154 F.3d
952, 962 (9th Cir. 1998) (*en banc*). (Doc. 78.)

1 Plaintiff's Motion to File a Cross-motion for Summary Judgment.

2 **I. Background**

3 Plaintiff's Complaint raised a claim for failure to protect; specifically, Plaintiff
4 asserted that Defendants ignored, denied, or failed to thoroughly investigate his
5 complaints that a kill-on-sight order had been issued against Plaintiff by a member of the
6 Mexican Mafia prison gang and that this led to Plaintiff's assault. Plaintiff made a
7 request to Defendants for Protective Segregation (PS) while at the Browning Unit; he did
8 not receive PS, he was transferred to the Morey Unit on July 9, 2010, and he was
9 assaulted that same day. (Doc. 8.)

10 In ruling on Defendants' previous Motion for Summary Judgment, the Court
11 concluded that the denials of protective segregation requests in 2005, 2006, and 2007 are
12 too remote in time to form the basis of a claim for an assault in July 2010. (Doc. 64 at 9.)
13 In their second Motion for Summary Judgment, Defendants, therefore, focus on events in
14 late 2009 and 2010 before the July 2010 assault. (Doc. 72 at 1.) In support of their
15 Motion, they submit their separate Statement of Facts (Doc. 73 (DSOF2)) the declaration
16 of Marlene Coffey, Associate Deputy Warden and ADC Protective Segregation Custody
17 Administrator (*id.*, Ex. 1), the declarations of Defendants Smith and Haley (*id.*, Exs. 2
18 and 3, respectively), and other exhibits. They also incorporate by reference their SOF
19 filed in support of their first Motion for Summary Judgment. (Doc. 72 at 6; ref. Doc. 58
20 (DSOF1).)

21 **II. Legal Standards**

22 **A. Summary Judgment**

23 A court "shall grant summary judgment if the movant shows that there is no
24 genuine dispute as to any material fact and the movant is entitled to judgment as a matter
25 of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23
26 (1986). Under summary judgment practice, the moving party bears the initial
27 responsibility of presenting the basis for its motion and identifying those portions of the
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1 record, together with affidavits, which it believes demonstrate the absence of a genuine
2 issue of material fact. *Id.* at 323.

3 If the moving party meets its initial responsibility, the burden then shifts to the
4 opposing party who must demonstrate the existence of a factual dispute and that the fact
5 in contention is material, i.e., a fact that might affect the outcome of the suit under the
6 governing law, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986), and that the
7 dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict
8 for the non-moving party. *Id.* at 250; *see Triton Energy Corp. v. Square D. Co.*, 68 F.3d
9 1216, 1221 (9th Cir. 1995).

10 When considering a summary judgment motion, the court examines the pleadings,
11 depositions, answers to interrogatories, and admissions on file, together with the
12 affidavits or declarations, if any. *See* Fed. R. Civ. P. 56(c). At summary judgment, the
13 judge's function is not to weigh the evidence and determine the truth but to determine
14 whether there is a genuine issue for trial. *Anderson*, 477 U.S. at 249. The evidence of
15 the non-movant is "to be believed, and all justifiable inferences are to be drawn in his
16 favor." *Id.* at 255.

17 **B. Failure to Protect**

18 States are obligated by the Eighth Amendment to protect prisoners from violence
19 at the hands of other inmates. *Farmer v. Brennan*, 511 U.S. 825, 833 (1994). But mere
20 negligent failure to protect an inmate from another inmate is not actionable under § 1983.
21 *Davidson v. Cannon*, 474 U.S. 344 (1986). A prison official violates the Eighth
22 Amendment in failing to protect one inmate from another only when two conditions are
23 met. First, the alleged constitutional deprivation must be, objectively, "sufficiently
24 serious;" the official's act or omission must result in the denial of "the minimal civilized
25 measure of life's necessities." *Farmer*, 511 U.S. at 834. Second, the prison official must
26 have a "sufficiently culpable state of mind," i.e., he must act with deliberate indifference
27 to inmate health or safety. *Id.* To demonstrate that a prison official was deliberately
28 indifferent to the threat of serious harm or injury by another prisoner, a plaintiff must

1 show that the “the official [knew] of and disregard[ed] an excessive risk to inmate . . .
2 safety; the official must both be aware of facts from which the inference could be drawn
3 that a substantial risk of serious harm exists, and [the official] must also draw the
4 inference.” *Id.* at 837; *Gibson v. County of Washoe*, 290 F.3d 1175, 1187-88 (9th Cir.
5 2002). To prove that officials knew of the risk, however, the prisoner may rely on
6 circumstantial evidence; in fact, the very obviousness of the risk may be sufficient to
7 establish knowledge. *See Farmer*, 511 U.S. at 842; *Wallis v. Baldwin*, 70 F.3d 1074,
8 1077 (9th Cir. 1995).

9 In addition, prison officials who actually knew of a substantial risk to inmate
10 health or safety may be found free from liability if they responded reasonably to the risk,
11 even if the harm ultimately was not averted. A prison official’s duty under the Eighth
12 Amendment is to ensure “reasonable safety.” *Farmer*, 511 U.S. at 844 (internal
13 citations omitted).

14 **III. Preliminary Issues**

15 The Court will deny Plaintiff’s Motion for Leave to File a Cross-motion for
16 Summary Judgment. (Doc. 85.) After the first Motion for Summary Judgment was
17 denied in part by Order dated April 11, 2013, Defendants promptly moved for leave to
18 file a second motion. (Docs. 66, 67.) The Court granted the motion on May 17,
19 permitting Defendants to file and serve such a motion with 15 days of the Order. (Doc.
20 71.) Defendants filed their second motion on May 26. (Doc. 72.) But Plaintiff neither
21 made a motion for leave to file a motion for summary judgment when Defendants filed
22 their motion for leave nor filed his motion within 15 days of the Order. Rather, Plaintiff
23 waited to file his response and cross-motion until June 7. (Doc. 76.) And he did not seek
24 leave to file a motion for summary judgment until August 5. (Doc. 85.) His motion is
25 untimely.

26 The Court will, however, grant Plaintiff’s Motion for an Extension of Time to
27 Respond to the *Rand* Notice. Thus, the Court will construe Plaintiff’s response and
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1 cross-motion and his Supplemental Response, which was filed after the *Rand* warning
2 was sent, as responses to Defendants' Motion.

3 **III. Motion for Summary Judgment**

4 **A. Parties' Contentions**

5 **1. Defendants**

6 Defendants assert that Plaintiff requested protective segregation (PS) in 2005,
7 2006, and 2007. (Doc. 72 at 2; ref. Doc. 61 at 1; Doc. 64 at 8.) The requests were denied,
8 but Plaintiff was transferred to different yards and inmates were placed on his Do Not
9 House With (DNHW) list.¹ (Doc. 72 at 2; ref. Doc 64 at 8.)

10
11 ¹ According to Defendants, the previous PS documents show the following:

12 In his December 21, 2005 PS, Plaintiff stated that the reason for his request was
13 because he was caught in the middle of an inmate war. (Doc. 58, DSOF1 ¶ 4, Ex. 5.) On
14 December 27, 2005, after an investigation, the PS request was denied and Plaintiff was
15 given Alternative Placement and moved to another unit. (*Id.* ¶ 5, Ex. 6.)

16 On December 29, 2005, Plaintiff appealed the denial of Protective Segregation. In
17 his appeal, he stated that the reasons he listed in his December 21, 2005 request were
18 false. (*Id.* ¶ 6, Ex. 7.) On December 30, 2005, Plaintiff again stated that the reasons he
19 listed for seeking PS in his December 21, 2005 request were false. He stated that the
20 actual reason was because he owed money to another inmate because he lost drugs he
21 was supposed to transport for New Mexican Mafia; Plaintiff lied because he did not want
22 prison authorities to know that he owed money for drugs. (*Id.* ¶ 7, Exs. 8-11.) On
23 January 9, 2006, the Warden upheld the decision to assign Plaintiff to a general
24 population yard. (*Id.* ¶ 8, Ex. 12.)

25 In his August 23, 2006 PS request, Plaintiff stated that he needed protection from
26 two inmates who said that he was a "death [sic] man before rec." (*Id.* ¶ 9, Ex. 13.) On
27 September 18, 2006 after an investigation, the inmates who allegedly threatened Plaintiff
28 were placed on his Do Not House With (DNHW) list; Plaintiff appealed the decision, was
given Alternative Placement and moved to another unit, and did not have any other
incidents with these inmates after they were placed on his DNHW list. (*Id.* ¶ 10, Exs. 14-
17.)

On June 7, 2007, Plaintiff requested PS, stating he was receiving threats from
another inmate in the New Mexican Mafia because he owed \$200 to the inmate for drugs.
(*Id.* ¶ 11, Exs. 18-19.) On June 13, 2007, after an investigation, Matson issued a decision
for Alternative Placement to move Plaintiff to another unit and added the inmate who
allegedly threatened Plaintiff to his DNHW List. (*Id.* ¶ 12, Exs. 20-22.) Plaintiff did not
have any other incidents with this particular inmate after he was placed on Plaintiff's
DNHW list. (*Id.*)

1 Defendants assert that if an ADC inmate needs protection from other inmates—
2 either generally or from specific inmates—ADC has a system in place to address the
3 inmate's issues; Department Order 805 (DO 805), Protective Segregation, governs PS in
4 the Arizona prison system and provides procedures for identifying and safeguarding
5 inmates with legitimate protection needs. (DSOF2 ¶ 3.) Placement in a PS unit is
6 scrutinized for operational and security reasons. (*Id.* ¶ 4.)

7 An inmate in need of protection has several options. The greatest degree of
8 protection is PS status, *i.e.*, placement in a unit that houses other inmates identified as
9 having safety concerns. There are multiple PS units throughout the prison system for
10 these types of inmates. (*Id.* ¶ 5.) An alternative is transferring the inmate to a different
11 bed assignment, cell block, prison unit, or prison complex; this is a viable plan when an
12 inmate has a conflict with particular inmates, but is otherwise able to live among other
13 prisoners. (*Id.* ¶ 6.) In addition, when an inmate is determined to pose a threat to the
14 safety of another inmate, he is included on the inmate's DNHW list. (*Id.* ¶ 7.)

15 To request PS, an inmate makes a written or verbal request for protection, which
16 triggers a documented review of the inmate's need for long-term PS status. (*Id.* ¶ 8.) He
17 is immediately isolated in a safe, reasonably secure area, and the Shift Commander is
18 notified. (*Id.* ¶ 9.) Information is gathered about the inmate's concerns and eventually
19 forwarded to the unit's deputy warden (DW), who reviews the initial information
20 gathered by corrections staff to determine if a protection issue exists. (*Id.* ¶¶ 10-15.) The
21 DW can request more information if an immediate solution cannot be reached. (*Id.* ¶ 15.)
22 Once the DW determines that a protection issue exists, he recommends either PS or
23 alternative placement to another unit. (*Id.* ¶ 17.)

24 The DW's decision is forwarded to the PS Administrator (PSA) for review. (*Id.*
25 ¶ 18.) The PSA or PSA Committee reviews the documentation and makes a final
26 decision. (*Id.* ¶ 19.) If the decision is different than that reached by the DW, there must
27 be a written explanation of the rationale. (*Id.*) The inmate can appeal the decision to the
28 Population Management Administrator, who reviews the appeal and responds. The

1 Population Management Administrator makes the final decision on an inmate's appeal.
2 (*Id.* ¶ 20.)

3 Plaintiff alleges that he sent inmate letters to officers Osborn² and Smith seeking
4 PS in late 2009. (Doc. 72 at 4; ref. Doc. 64 at 9.) Plaintiff's sister also sent a letter to
5 Director Ryan on August 12, 2009 asking that he be placed in PS. (Doc. 61 at 20.)
6 ADC's Constituent Services Office responded to this letter in September 2009, advising
7 Plaintiff's sister that he needed to work with ADC investigators and staff to provide them
8 information, not the Director's Office. (DSOF ¶ 43; Doc. 58, Ex. 24.) Plaintiff's sister
9 indicated that she understood and would communicate this to him. (*Id.*)

10 Plaintiff also apparently made a PS request in January of 2008. (DSOF ¶ 21.) On
11 January 8, 2010, DW Ramos requested further review of Plaintiff's PS request. (*Id.*)
12 Plaintiff was in the Arizona State Prison Complex-Eyman, Browning Unit (Browning)
13 from mid-2008 through July 2010. Browning is a maximum-security unit where inmates
14 are isolated from other inmates. It is a secure unit, and inmates seeking PS are not moved
15 from Browning while the DO 805 investigation and process is pending. (*Id.* ¶ 22.)

16 Plaintiff alleges that on October 7, 2009, he submitted an Inmate Letter to
17 Defendant Smith in which he stated a "kill on site" order was issued on his life by inmate
18 Fernando Cardova. (Doc. 8 at 4.) However, the Inmate Letter actually reiterated
19 Plaintiff's previously denied requests related to the Mexican Mafia and stated that
20 Plaintiff's life was "in danger" because he "used to run with the Raza" but had switched
21 to a "Daisa." (Doc. 58, DSOF1 ¶¶ 14, Ex. 25.)

22 On January 14, 2010, CO II Munoz interviewed Plaintiff as a result of an Inmate
23 Letter he submitted to him dated January 8, 2010. (DSOF2 ¶ 23.) CO II Munoz noted
24 that Plaintiff offered him \$500 to place him in protective segregation. CO II Munoz
25 refused, and told Plaintiff his PS request was being evaluated. An Inmate Disciplinary
26 Report was filed about this incident. (*Id.*)

27
28 ² Osborn was previously dismissed. (Doc. 64.)

1 On January 29, 2010, Plaintiff was placed in investigative detention while the
2 protective segregation evaluation was pending; he remained in the Browning Unit. (*Id.* ¶
3 24.) On February 9, 2010, Plaintiff completed and signed a Protective Segregation
4 Inmate Statement, claiming:

5
6 I have owe Fernando \$1,600 and \$200 to Santo they both are Mexican
7 Mafia and I have P.C. up many time and everywhere I have been I have
8 been threatened verbally that they will get me when they have a chance to
9 and I know for a fact that my life will be in danger if I go back to a G.P.
yards. So I'm requesting to go to a P.C. yard.
Thank You.

10 (*Id.* ¶ 25.)

11 An investigative summary report, dated February 9, 2010, stated that "Inmate has
12 not provided any new information that he has not already provided in the past when he
13 was interviewed by ASPC Winslow SSU Officer Toner and CIU Investigator R. Moore."

14 (*Id.* ¶ 26.)

15 On February 9, 2010, Officers Munoz and Chavez interviewed Plaintiff about his
16 PS request and wrote in an Information Report that Plaintiff said he owed money to the
17 Mexican Mafia for drugs and that he would be killed if he went to an open yard. (*Id.*
18 ¶ 27.) On February 9, 2010, Officer Munoz completed a Protective Segregation
19 Interview Assessment, recommending that the matter be forwarded to a CO IV for further
20 review and on February 10, 2010, completed a Protective Segregation Security Initial
21 Interview, which is a list of questions answered in his initial interview. (*Id.* ¶¶ 28-29.)
22 On February 23, 2010, DW Ramos concluded that alternative placement was an
23 appropriate response to Plaintiff's PS request, reasoning that:

24
25 Inmate has been through the PS process and has no substantiated
26 information that can be verified of a drug debt of \$1500.00. He is
27 not on any hit list, nor is he able to provide any new information.
28 Recommend Alternative Placement to A01.

1 (Id. ¶ 30.) The issues concerning his drug debts were largely the same as alleged and
2 investigated in 2006 when his PS was request was denied. (Doc. 72 at 5; DSOF2, Coffey
3 Decl. ¶¶ 27-29, 32.)

4 On April 2, 2010, PS Committee Chairperson Matson, as well as a member of the
5 STG Unit and the Central Classification, agreed with DW Ramos' decision for alternative
6 placement to PS. (DSOF ¶ 31.) The decision was presented to Plaintiff on or about April
7 22, 2010, and he was advised that he could appeal the decision. Plaintiff indicated that he
8 would not waive his appeal rights; however, there is no record of an administrative
9 appeal being filed. (Id. ¶ 32.)

10 Defendants assert that Smith does not remember receiving an inmate letter from
11 Plaintiff in October of 2009 and denies it is his signature on the inmate letter. It is signed
12 as a CO II, and he had been a CO III for more than three years at the time of the letter.
13 (Id. ¶¶ 34-35; id. Smith Decl. ¶¶ 4-5.) Had Smith received this inmate letter, he would
14 have moved Plaintiff to a secure area, and immediately notified his supervisor. (Id. ¶ 37.)
15 Smith does not remember receiving this letter or notifying his supervisor about Plaintiff.
16 (Id.) Smith contends that he never had any information that Plaintiff was at risk of any
17 harm and that this lawsuit was the first time Smith had any information that Plaintiff
18 believed he was at risk. (Id. ¶ 38.)

19 Defendants assert that Haley was not involved in PS matters for ADC in 2009 or
20 2010 and had no knowledge of Plaintiff's protective segregation request in 2009 or 2010,
21 received no communications from him or anyone on his behalf that he believed he was at
22 risk in 2009 or 2010, and had no knowledge or information that Plaintiff believed he was
23 at risk in 2009 or 2010. (Id. ¶¶ 40-42.)

24 Defendants also argue that they acted reasonably. (Doc. 72 at 7-11.) Matson was
25 the PS Administrator at the time the 2010 PS request and agreed with DW Ramos's
26 February 23, 2010, decision to deny PS request and alternatively place Plaintiff in
27 another unit. Plaintiff's concerns and PS issues were investigated and addressed through
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1 the investigation. Although Plaintiff did not obtain the result he wanted, Matson was not
2 indifferent to the threat and responded reasonably to the risk. (*Id.* at 7.)

3 Haley was not involved in the 2009-2010 PS requests and Plaintiff makes no claim
4 that Haley took any specific action. (*Id.* at 9-10.) As to Smith, in October, 2009,
5 Plaintiff was in isolation in the Browning Unit and alleges that Smith forwarded his
6 inmate letter to COI IV Osborn, his supervisor. (Doc. 8 at 11; DSOF ¶ 37.) Thus, Smith
7 did what he was supposed to do under ADC policy, and Plaintiff was not injured between
8 the time he allegedly gave the inmate letter to Smith and the time Plaintiff was involved
9 in the PS process in January, 2010. (*Id.* at 10.)

10 Defendants assert that Ryan responded reasonably to the potential threat posed to
11 Plaintiff as outlined in the letter from his sister; Ryan forwarded it to the Constituent
12 Services Office, and Plaintiff's sister was advised as to what her brother had to do.
13 Further, the assault did not happen until after a PS investigation was done. (*Id.* at 11.)

14 Defendants argue that they are entitled to qualified immunity. (*Id.* at 11-13.)

15 **2. Plaintiff**

16 In support of his opposition (Doc. 76), Plaintiff submits his Statement of Facts
17 (Doc. 77 (PSOF)), with inmate declarations (*id.*, Attach. A), his own declaration (*id.*,
18 Attach. B), and documents from 2006 (*id.*, Ex. C). He also submits his Supplemental
19 Response with exhibits. (Doc. 81.)

20 Plaintiff asserts that he agrees with DSOF 1-22 regarding how PS should work
21 when it is requested. (PSOF ¶ 1.) He requested PS in 2005, 2006, 2007, 2008, 2009, and
22 2010 because his life was in danger. (*Id.* ¶ 2.) His sister wrote Ryan on August 12, 2009
23 asking that Plaintiff be placed in PS because his life was in danger. (*Id.* ¶ 3.) Plaintiff
24 was denied PS for five years until he was assaulted on July 9, 2010. (*Id.* ¶ 4.)

25 Plaintiff contends that the same information existed from 2005 until the assault in
26 2010. (*Id.* ¶ 5; Doc. 58, Ex 28 confirming lists of Mexican Mafia members.) He asserts
27 that he provided the names of the people who threatened him on many occasions. (PSOF
28 ¶ 6; Doc. 58, Exs. 5, 8, 9, 10, 13, 15, 18, 19, 20, 21.) He alleges that "Defendants know,

1 and it is common knowledge, that when you have problems with a prison gang, it does
2 not go away and you cannot hide from them (except) in PS status.” (PSOF ¶7, Attach.
3 Inmate Decls.) Before the assault, Plaintiff wrote directly to Ryan begging for help. (*Id.*
4 ¶ 9.) As far back as December 2005, Defendants were made aware that Plaintiff would
5 have problems with the New Mexican Mafia, a prison gang, for giving their names and
6 nicknames and involvement with smuggling. (*Id.* ¶ 11, Doc. 58 Criminal Investigation
7 Report of Richard Moore.) Plaintiff asserts that his request for protection was found in
8 the cell of the leader of the Hispanics. (*Id.* ¶ 12; Doc. 58, Ex. 7; Doc. 73 at 017, 019.)

9 Plaintiff argues that gang violence is well documented in Arizona and that prison
10 murders are committed by gang members. (Doc. 76 at 5-6.) He asserts that when an
11 inmate requests PS, he becomes *persona non grata*; if the problem is gang-related, it is
12 from then on out a gang issue and the inmate is labeled a snitch, subject to attack at any
13 time. (*Id.* at 6.) Status as a snitch can create a risk. (*Id.*) “This branding was
14 accomplished when ADOC staff allowed Plaintiff’s request for protection to fall into the
15 hands of gang members.” (*Id.* at 7, PSOF ¶ 12.) He argues that despite Defendants’
16 knowledge, they simply put Plaintiff in an alternative placement and added known gang
17 members to his DNHW list but that it is common knowledge that no matter where a gang
18 member is housed, he can reach his intended victim. (Doc. 81 at 2.) As to the Court’s
19 previous conclusion that denials of requests for PS in 2005, 2006, 2007, 2008 are too
20 remote to form the basis for a claim of assault in July 2010, Plaintiff alleges that the only
21 reason that he was not assaulted was that he continually refused to house at any General
22 Population unit and was sanctioned for that. (*Id.*)

23 Plaintiff asserts that Matson had possession of all documents sent by Plaintiff and
24 the investigative reports and was aware that Plaintiff had given the names of prisoners
25 who were members of the New Mexican Mafia and of their propensity for violence.
26 (Doc. 76 at 8.) He was aware that the New Mexican Mafia make good on their threats
27 and that Plaintiff requested PS six times and was branded as a PS case and snitch. (*Id.*)
28

1 Plaintiff claims this was not a difference of opinion and that three hours after being
2 moved, Plaintiff was assaulted. A jury could infer deliberate indifference. (*Id.* at 8-9.)

3 Plaintiff alleges that Haley was employed by ADC from June 2004 to October
4 2008 in the PS Unit and was aware that Plaintiff had given names verified to be gang
5 members and knew that Plaintiff would not be safe unless in PS status. (*Id.* at 9.) As to
6 Smith, Plaintiff argues that under DO 805, the PS process should have been started; the
7 allegation that Smith failed to start the process is “just one more in the continuing failure
8 by ADOC staff” to respond. (*Id.* at 10.) “Were Smith to have started the process then
9 Plaintiff might have convinced them to place him on PS status.” (*Id.*) Plaintiff explained
10 face to face to Smith that he needed PS; he disputes Smith’s claims that the signature on
11 the inmate letter is not his. (Doc. 81 at 3-4.) Regarding Ryan, Plaintiff contends that it
12 was incumbent upon Ryan to step in when his staff failed to act in this matter and that
13 Ryan knows the Mexican Mafia well. (Doc. 76 at 10.) When Plaintiff and his sister sent
14 letters to Ryan, he was obligated to do more than pass them along. (*Id.* at 11.)
15 Plaintiff’s sister is a taxpayer, yet Ryan disregarded her concern for her brother’s safety.
16 (Doc. 81 at 1-2.) The investigators and staff to whom Ryan referred the issue determined
17 that Plaintiff appeared to be telling the truth, was worried about his safety, and there was
18 a degree of risk to Plaintiff. (*Id.* at 4-5.)

19 Plaintiff argues that Defendants are not entitled to qualified immunity. Plaintiff
20 argues that his case involves the same gang members and set of facts from a 2005
21 incident. (Doc. 76 at 11-12.) Defendants found Plaintiff’s information accurate and, the
22 leader of the Hispanic inmates was found to have Plaintiff’s request for PS in his cell.
23 (*Id.* at 12.)

24 **3. Reply**

25 Defendants reply that there is no connection between Haley and Plaintiff’s 2009-
26 2010 PS requests. He was not on the Protective Segregation Committee that denied his
27 request before the assault and was not involved with Plaintiff’s 2009-2010 PS requests.
28

1 As to Ryan and Smith, the August 2009 letter to Ryan from Plaintiff's sister was
2 sent to ADC's Constituent Services Office, which responded in September 2009. (DSOF
3 ¶ 43; Doc. 68, Ex. 24.) Although Smith does not remember ever receiving the October
4 2009 inmate letter and denies it was his signature on the inmate letter, Plaintiff asserts
5 that Smith sent the inmate letter to his supervisor Officer Osborn. (Doc. 8 at 11).
6 Defendants contend that Plaintiff is claiming that Smith and Ryan should have directly
7 put him in the PS process. (Doc. 83 at 2; ref. Doc. 8 at 11; Doc. 76 at 9-11.) Defendants
8 argue that in fact Plaintiff *was* put through the PS process after these communications
9 were received and before he was assaulted: Plaintiff was involved in the PS process in
10 January, 2010 and was assaulted in July 2010. (Doc. 83 at 2.) He was not injured
11 between the time he allegedly gave the inmate letter to Smith in October 2009 or when
12 Ryan received the August 2009 letter and the time he was involved in the PS process.
13 Therefore, there is no connection between Smith and Ryan's actions and the failure to put
14 Plaintiff through the PS process. (*Id.*)

15 Defendants argue that Matson, as well as two other ADC officials, agreed with
16 DW Ramos that Plaintiff should be alternatively placed and not given PS. (*Id.* at 3.)
17 There is no dispute that ADC conducted an investigation of Plaintiff's protective
18 segregation situation, noted that his claims were identical to claims that he had been
19 made in the past, investigated through the PS process, and no new information was
20 provided. Plaintiff's disagreement with the determination does not constitute deliberate
21 indifference. (*Id.*)

22 Finally, Defendants reassert their entitlement to qualified immunity.

23 **B. Analysis**

24 The Court will grant Defendants summary judgment. Plaintiff fails to create a
25 triable issue of fact that any Defendant was deliberately indifferent to his safety, and in
26 the alternative, the Court finds that Defendants are entitled to qualified immunity.
27
28

1 First, the Court has already found that denials of protective segregation requests in
2 2005, 2006, and 2007³ are too remote in time to form the basis of a claim for an assault in
3 July 2010. If Plaintiff was threatened after a denial, the relevant inmates were added to
4 his DNHW list and there is no evidence that he was assaulted following these denials.
5 Plaintiff now claims in his Supplemental Response that the only reason he was not
6 assaulted is that he refused the alternative placements and was sanctioned for that refusal.
7 It is not clear where he was then housed, but even assuming that it was a segregation unit,
8 Plaintiff is speculating that he would have been threatened or assaulted if he had moved
9 to the alternative placement yards. But conclusory allegations, unsupported by factual
10 material, are insufficient to defeat a motion for summary judgment. *Taylor v. List*, 880
11 F.2d 1040, 1045 (9th Cir. 1989); see *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978,
12 984 (9th Cir. 2007) (“[c]onclusory, speculative testimony in affidavits and moving papers
13 is insufficient to raise genuine issues of fact and defeat summary judgment”). And to the
14 extent that Plaintiff he is challenging the 2005, 2006, and 2007 determinations, these
15 claims are time barred. Such claims should have been brought within two years of
16 accrual. See *Wilson v. Garcia*, 471 U.S. 261, 280 (1985); Ariz. Rev. Stat. § 12-542
17 (providing that actions for personal injury must be commenced within two years after the
18 cause of action accrues).

19 Turning to the individual Defendants, the Court finds that Plaintiff creates no
20 triable issue of fact as to Haley’s liability. It is undisputed that Haley was not involved in
21 the 2009 or 2010 requests for PS. Thus, Plaintiff can show no affirmative link between
22 Haley and the denial of PS for the relevant period and no connection to the assault. See
23 *Rizzo v. Goode*, 423 U.S. 362, 371-72 (1976) (to prevail on a claim under § 1983, a
24 plaintiff must demonstrate that he suffered a specific injury as a result of specific conduct
25

26
27 ³ Although Plaintiff also apparently requested PS in 2008, neither party discusses
28 the circumstances or result of that request. Based on the undisputed evidence that the
2009-2010 request raised the same issue that had been addressed previously, the Court
will assume that no new evidence was presented in connection with the 2008 request.

1 of a defendant and show an affirmative link between the injury and the conduct of that
2 defendant).

3 As to Smith and Ryan, it appears that Plaintiff is arguing that both should have
4 placed him into PS or personally initiated the PS process. But even assuming Smith
5 received the October 7, 2009 Inmate Letter, Plaintiff himself alleges that Smith passed
6 the letter on to his supervisor. There is no evidence that Smith could have given Plaintiff
7 PS status. And even if Smith should have taken additional steps, such as isolating
8 Plaintiff, there is no evidence that Plaintiff was harmed by Smith's failure to do so---the
9 assault did not occur until July 2010, after Plaintiff had, in fact, again gone through the
10 PS process.

11 Likewise, Ryan passed Plaintiff's letter on to prison officials, advising that
12 Plaintiff cooperate with the PS process; he did not ignore the Plaintiff's or Plaintiff's
13 sister's complaints of threats to safety. The Court finds Ryan had no duty to personally
14 intervene under these circumstances and that he acted reasonably. A prison official's
15 duty under the Eighth Amendment is to ensure "reasonable safety." *Farmer*, 511 U.S.
16 825, 844 (1994) (internal citations omitted). This means that even if prison officials
17 actually knew of a substantial risk to inmate health or safety, they may be found free
18 from liability if they responded reasonably to the risk, even if the harm ultimately was not
19 averted. *Id.* In addition, there is no *respondeat superior* liability under § 1983, and,
20 therefore, a defendant's position as the supervisor of persons who allegedly violated
21 Plaintiff's constitutional rights does not impose liability. See *Monell v. New York City*
22 *Dep't. of Soc. Servs.*, 436 U.S. 658, 691-92 (1978). Thus, even if Plaintiff could show
23 that another Defendant was deliberately indifferent, which he cannot, Ryan is not liable.
24 And as with Smith, the assault did not occur until July 2010, after Plaintiff had again
25 gone through the PS process; thus, there is no triable issue of fact as to Ryan's liability.

26 As to Matson, the undisputed evidence shows that Plaintiff was evaluated for PS
27 in 2010. It is undisputed that he presented the same evidence that had been evaluated in
28 the past and found insufficient for PS. (DSOF2, Attach. 2, Bates No. 001, 006, 008.)

1 Plaintiff submits many conclusory statements from other inmates regarding gang violence
2 and that once an inmate is on a hit list, that situation follows him. He also claims that
3 once an inmate has requested PS, he is labeled as a snitch and subject to violence. But
4 conclusory allegations, unsupported by factual material, are insufficient to defeat a
5 motion for summary judgment. *See Taylor*, 880 F.2d at 1045; *see Soremekun*, 509 F.3d at
6 984.

7 Moreover, Plaintiff submits no evidence that Matson *believed* that Plaintiff was on
8 a hit list and would be subject to violence in any General Population yard and yet denied
9 Plaintiff PS. DW Ramos concluded that Plaintiff “is not on a hit list” and could not
10 provide additional information. (DSOF2, Ex. 1, Attach. 2, Bates 014, see also 016.)
11 Plaintiff presents no evidence that Matson “[knew] of and disregard[ed] an excessive risk
12 to inmate . . . safety.” *See Farmer*, 511 US at 837. Asserting that matters are common
13 knowledge is not sufficient. And as with Ryan, Matson is free from liability if he
14 responded reasonably to the risk, even if the harm ultimately was not averted. *Id.* at 844.

15 Courts have observed that “[p]rotecting the safety of prisoners and staff involves
16 difficult choices and evades easy solutions. . . . Courts often lack competence to evaluate
17 fully prison administrative decisions.” *Berg v. Kincheloe*, 794 F.2d 457, 460 (9th Cir.
18 1986) (quoting *Bell v. Wolfish*, 441 U.S. 520, 546, 547-48 (1979)). “Prison administrators
19 therefore should be accorded wide-ranging deference in the adoption and execution of
20 policies and practices that in their judgment are needed to preserve internal order and
21 discipline and to maintain institutional security. *Bell*, 441 U.S. at 547-548. In *Berg*, the
22 Ninth Circuit affirmed summary judgment for prison officials who investigated a threat to
23 the inmate’s safety and stated that “[i]f the evidence only involves a dispute over the . . .
24 existence of arguably superior alternatives . . . the plaintiff has not met his burden and the
25 case should not be submitted to a jury.” 794 F.2d at 460, 462. Likewise, in *Slone v.*
26 *Arizona Department of Corrections*, No. 05-16905, 2009 WL 118952 at *1 (9th Cir. Jan.
27 13, 2009) the district court affirmed summary judgment against an Arizona inmate who
28 claimed that the defendants acted with deliberate indifference because they denied his

1 protective segregation request “when they investigated his requests and transferred him to
2 a different prison unit as an alternative to placing him in protective segregation.” Here, an
3 investigation was conducted and Plaintiff was placed in a yard that the prison
4 administration believed was safe and not populated by the people who had threatened
5 him. Although the subsequent assault was very unfortunate, the prison administration
6 responded reasonably to the perceived risk.

7 Finally, the Court finds that Defendants are entitled to qualified immunity.
8 Plaintiff had no clearly established right to have Smith or Ryan place him in PS or
9 personally initiate the PS process. They would have reasonably believed they were
10 acting constitutionally when they passed Plaintiff’s PS requests on to other prison
11 officials. Moreover, Plaintiff had no clearly established right to be placed in PS simply
12 because he had previously requested PS and was therefore allegedly labeled a snitch.
13 While it is disturbing that the request for PS was found in another inmate’s cell, (Doc. 73
14 at 017, 019; Doc. 73-2 at 38, 40), the record shows that this happened in June 2006.

15 Because there are no triable issues of fact, the Court will grant Defendants’
16 Motion for Summary Judgment.

17 **IT IS ORDERED** that:

18 (1) Defendants’ Motion to Strike Plaintiff’s Motion for Summary Judgment
19 (Doc. 84) is **granted**, Plaintiff’s Motion for Summary Judgment (Doc. 76) is **stricken**,
20 and Plaintiff’s Motion for Leave to file his Cross-motion (Doc. 85) is **denied**.

21 (2) Plaintiff’s Motion for Extension of time to Respond to the Court’s *Rand*
22 notice (Doc. 80) is **granted**.

23 (3) Defendants’ Motion for summary Judgment (Doc. 72) is **granted**.

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1 (4) The action is terminated, and the Clerk of Court must enter judgment
2 accordingly.

3 DATED this 8th day of September, 2013.

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7 Robert C. Broomfield
8 Senior United States District Judge
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